United States – Transitional Safeguard Action on Combed Cotton Yarn from Pakistan

(WT/DS/192)

First Written Submission of the United States

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I. INTRODUCTION

1. In December 1998, the United States invoked the transitional safeguard mechanism of Article 6 of the WTO Agreement on Textiles and Clothing (ATC) in response to a sharp and substantial increase in imports from Pakistan of Category 301, combed cotton yarn.[1] The United States took this action based on an investigation conducted to determine whether the surge in imports from Pakistan had caused serious damage or actual threat of serious damage to the domestic combed cotton yarn for sale industry.

2. This investigation revealed that low-priced imports from Pakistan surged 283.2 percent in the period between January-August 1997 and January-August 1998. The detrimental impact of this surge on the domestic industry during this period was striking: production dropped 10.2 percent, shipments declined 14.2 percent, inventories increased by 145.9 percent, unfilled orders fell 15.8 percent, profitability lagged 46.2 percent, the market share of U.S. producers contracted ten percentage points, investment stagnated, and two mills exited the industry. This is precisely the kind of situation that the special transitional safeguard of Article 6 is designed to cover.

3. Pakistan challenges the consistency of this safeguard measure with the ATC. As set out below, Pakistan's many objections are unfounded. The United States fully satisfied its obligations under the ATC in invoking the transitional safeguard mechanism on Category 301 imports of combed cotton yarn from Pakistan.

4. Moreover, as Pakistan admits, its principal objective in this dispute goes beyond a finding as to the consistency with the ATC of the particular U.S. safeguard at issue in this dispute.[2] Pakistan's real purpose is to use the dispute settlement mechanism to reopen the safeguard investigation, reinvestigate the market situation, and obtain advisory opinions with respect to a hypothetical future dispute about measures not even in existence. These objectives are not within the scope of WTO dispute settlement and should be rejected accordingly.

II. PROCEDURAL HISTORY

5. On 24 December 1998, the United States requested consultations with Pakistan pursuant to Article 6.7 of the Agreement on Textiles and Clothing (ATC) regarding Category 301 imports of combed cotton yarn from Pakistan.[3]

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[1] Category 301 refers to the specific U.S. textile category for combed cotton yarn and correlates to partial classifications under the Harmonized Tariff Schedule (HTS) of the United States. Categories serve to identify particular textile and clothing products and represents the basis on which the United States administers its textiles program, including safeguard actions under Article 6 of the ATC. The United States has employed the present category system since 1978. *See* U.S. Exhibit 1 ("U.S.-1") for a correlation of Category 301 with the relevant HTS numbers.

[2] First Written Submission of Pakistan, at p. 20.

[3] 63 *Federal Register* 72288 (31 December 1998), attached as U.S. Exhibit 2 ("U.S.-2"). The United States publishes all federal rules, proposed rules, and notices in the *Federal Register*.

6. The United States accompanied this request with supporting factual information and the specific level at which imports were proposed to be restrained. That information set forth the U.S. determination that a sharp and substantial increase in Category 301 imports from Pakistan caused serious damage and actual threat of serious damage to the U.S. industry and included, among other facts, data demonstrating that imports of combed cotton yarn from all sources had increased 91.3 percent in January-August 1998 over their level in January-August 1997 and that imports of the same yarn from Pakistan increased 283.2 percent during the same period.[4]

7. Pursuant to Article 6.7, the United States also communicated this request for consultations, including the relevant factual data, to the Chairman of the Textiles Monitoring Body ("TMB").

8. Consultations held between the United States and Pakistan on 10-11 February 1999 failed to result in a mutual understanding. On 5 March 1999, pursuant to Article 6.10, the United States indicated that it would apply the safeguard effective 17 March 1999 and notified the TMB of its action.[5]

9. The TMB reviewed the matter and heard presentations of the United States and Pakistan on 12-14, 20-22 and 27 April 1999. In its report, the TMB concluded that "it was not in a position to assess without doubt whether or not serious damage had been caused to the US industry" and recommended that the United States rescind the limit.[6]

10. Pursuant to Article 8.10, the United States on 27 May 1999 asked the TMB to reconsider its recommendation and submitted detailed reasons supporting its request.[7] On 29 June 1999, the TMB issued a report and recommended that the United States rescind the limit.[8]

11. On 6 August 1999, the United States informed the TMB that it believed that Article 6 of the ATC justified the transitional safeguard and that it would maintain the restraint.[9]

12. The United States and Pakistan conducted a second round of consultations on 15-16 November 1999, but no mutual understanding was reached.

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[4] *Report of Investigation and Statement of Serious Damage or Actual Threat thereof: Combed Cotton Yarn for Sale: Category 301, December 1998* ("Market Statement"), attached as U.S. Exhibit 3 ("U.S.-3").

[5] 64 U.S. *Federal Register* 12290 (12 March 1999) attached as U.S. Exhibit 4 ("U.S.-4").

[6] "Report of the Fifty-Fourth Meeting, Note by the Chairman," G/TMB/18, 29 April 1999.

[7] Pakistan included this document at Exhibit PAK-5.

[8] "Report of the Fifty-Sixth Meeting, Note by the Chairman" G/TMB/19, 29 June 1999.

[9] "Communication by the United States," G/TMB/N/346, circulated on 24 September 1999, attached as U.S. Exhibit 5 ("U.S.-5").

13. In response to a dramatic increase in Category 301 imports from Pakistan, the United States extended the restraint for another year effective 17 March 2000 pursuant to Article 6.12.[10]

14. On 3 April 2000, Pakistan requested the establishment of a dispute settlement panel pursuant to Article XXIII:2 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), Article 6 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), and Article 8.10 of the ATC. Pakistan claimed that the transitional safeguard applied by the United States was inconsistent with paragraphs 2, 3, 4, and 7 of Article 6 of the ATC.

15. The Dispute Settlement Body ("DSB") established a panel on 19 June 2000 to consider the U.S. transitional safeguard measure, with the standard terms of reference, namely:

> To examine, in the light of the relevant provisions of the covered agreements cited by Pakistan in document WT/DS192/1, the matter referred to the DSB by Pakistan in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[11]

The European Communities and India reserved their third-party rights to participate in the panel process.

III. FACTUAL BACKGROUND

16. In response to a sharp and substantial increase in Category 301 imports of combed cotton yarn, the United States undertook an extensive investigation of the conditions prevailing in the domestic market for this product and the circumstances affecting its domestic producers. This investigation revealed that imports from Pakistan of Category 301 combed cotton yarn had caused serious damage and actual threat of serious damage to the domestic industry producing like and/or directly competitive products.

17. In December 1998, the United States set forth its findings and conclusions in the Market Statement.[12] This report explains the findings and conclusions at length and describes the investigation that the United States conducted. Those findings address each factor enumerated in Article 6 of the ATC and survey other factors affecting the U.S. combed cotton yarn for sale industry. The methodology and key findings of the Market Statement are briefly set out below.[13]

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[10] 65 *Federal Register* 14544 (17 March 2000), attached as U.S. Exhibit 6 ("U.S.-6").

[11] "United States - Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan: Constitution of the Panel Established at the Request of Pakistan," WT/DS192/2, 4 September 2000.

[12] *See supra* note 4.

[13] The President of the United States has delegated the authority to implement textile and apparel agreements, including the ATC, to the interagency Committee for the Implementation of Textile Agreements

(continued...)

18. In conducting its investigation, the United States utilized official U.S. Bureau of Census statistics and information collected by the U.S. national trade association of the sales yarn industry (the American Yarn Spinners Association, or AYSA). The United States used official Bureau of Census data to the extent possible and relied on such data to calculate imports and exports and to verify production data provided by AYSA. AYSA collected data from the industry on production, shipments, employment, man-hours, wages, capacity utilization, inventories, unfilled orders, profits, price, and investment, aggregated the data, and provided aggregate information to the United States. The United States also collected data from published sources, including price data available in *American Textiles International*. The United States verified the information provided by AYSA to ensure that it was complete and accurate.[14]

19. The United States identified the relevant domestic industry producing like and/or directly competitive products to be the "combed cotton yarn for sale industry." The combed cotton yarn for sale industry produces combed cotton yarn as a final product for sale on the open market. This yarn is purchased by woven and knit fabric producers, manufacturers of apparel and other fabricated textile products, and competes directly with imported yarn.[15] The combed cotton yarn for sale industry does not include vertically integrated producers, which produce fabric, apparel, or home furnishings, and which manufacture combed cotton yarn for their own consumption in the production of these other end products.[16]

20. The United States undertook a careful examination of the conditions in the U.S. market as they relate to the factors set forth in Articles 6.3 of the ATC, as well as other factors identified as relevant and material.[17]

21. The United States found that during the period January-August 1997 and January-August 1998, imports of products in Category 301 increased by 91.3 percent from all sources and 283.2 percent from Pakistan, and that Pakistan's share of imports jumped from 8.8 to 17.5 percent.

22. During this same period, domestic production dropped 10.2 percent, shipments declined 14.2 percent, exports fell 32.9 percent, unfilled orders declined 15.8 percent, employment declined 6.6 percent, capacity utilization declined, profitability contracted 46.2 percent, investment stagnated,

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[13] (...continued)
(CITA). For purposes of safeguard actions, the Office of Textiles and Apparel (OTEXA), within the U.S. Department of Commerce, conducts the investigation and produces the statement of serious damage or actual threat of serious damage, and CITA reviews the statements and makes the determination of serious damage or actual threat thereof.

[14] Market Statement, at ¶ 1.4.

[15] Market Statement, at ¶ 4.2.

[16] Market Statement, at ¶¶ 3.1, 4.1, Appendix I.

[17] Market Statement, at ¶ 5.1.

and U.S. market share fell 10 percentage points. At the same time, inventories increased 145.9 percent, and two mills producing combed cotton yarn for sale exited the industry. In addition, the average price of all imports of Category 301 products during this period was 7.8 percent below the average U.S. combed cotton yarn for sale producers price.[18]

23. The United States also examined the factors set out in Article 6.2. The United States found that the apparent domestic market remained constant during this period covered by the investigation and concluded that there had been no change in consumer preference. The United States also noted that there had been no technological changes that might have accounted for an adverse trend in the industry's market position.[19]

24. The United States determined – based on these data – that imports of combed cotton yarn had caused serious damage to the domestic combed cotton yarn for sale industry.[20]

25. The United States conducted a separate analysis of the factors enumerated in Article 6.2 and Article 6.3 and found that imports of combed cotton yarn also caused actual threat of serious damage or the exacerbation of serious damage to the industry.[21] The United States concluded that every benchmark of economic performance in 1998 was low and deteriorating: profits, prices, shipments, market share, employment, capacity utilization, and new orders were falling while import penetration, inventories, and wages were rising, and new investment in productive capacity was stagnant.[22] The United States also found that imported combed cotton yarn would continue to enter the domestic market at prices likely to put severe pressure on domestic prices, which in turn could negatively impact domestic production, market share, and return on investment.[23]

26. The United States also examined the factors set out in Article 6.4 and attributed the cause of serious damage and actual threat of serious damage to the sharp and substantial increase in imports of combed cotton yarn from Pakistan based on a comparison with imports from other sources, market share, and import and domestic prices.

27. Between January-August 1997 and January-August 1998, imports from Pakistan of combed cotton yarn surged by 283.2 percent compared with an increase of 91.3 percent from all sources. During the same period, imports from Pakistan as a percentage of total imports doubled, Pakistan's share of domestic production increased four-fold, and Pakistan's average import price was 26.2 percent below the average U.S. price while the average world import price was 7.8

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[18] Market Statement, at ¶¶ 5.1-5.22, Table I.

[19] Market Statement, at ¶¶ 5.18, 6.7.

[20] Market Statement, at ¶¶ 6.1- 6.6.

[21] Market Statement, at ¶¶ 8.1-8.7.

[22] Market Statement, at ¶¶ 8.3-8.4.

[23] Market Statement, at ¶ 8.6.

percent below the average U.S. price. Where imports from Pakistan were concentrated, Pakistan's price was 28.3 percent below the average U.S. price.[24]

28. Based on the above data, the United States concluded that the sharp and substantial surge in Category 301 imports from Pakistan had caused serious damage and actual threat of serious damage. Accordingly, the United States invoked the Article 6 transitional safeguard and requested consultations with Pakistan.

IV. LEGAL ARGUMENTS

29. The U.S. transitional safeguard on Category 301 imports of combed cotton yarn from Pakistan fully accords with the ATC. The United States identified the relevant domestic industry as the combed cotton yarn for sale industry and reasonably determined, based on verified data, that the surge in imports of combed cotton yarn from Pakistan had caused serious damage and actual threat of serious damage to the defined domestic industry.

30. Pakistan challenges this determination and alleges that the U.S. safeguard measure violates the ATC. As the party asserting the violation of the ATC, Pakistan has the burden of proving its claim.[25] However, Pakistan fails to offer legally sufficient evidence and arguments to establish a *prima facie* case that the U.S. transitional safeguard was inconsistent with its obligations under Article 6. Pakistan implicitly recognizes this fact in its First Written Submission and asks the Panel to "...seek additional evidence from Pakistan should it conclude that Pakistan needs to submit further information to establish a *prima facie* case."[26] Pakistan, not the Panel, has the burden of establishing a *prima facie* case, and the Panel should not assist Pakistan in meeting its burden.

31. In any event, as demonstrated below, the U.S. transitional safeguard on combed cotton yarn from Pakistan is well within the rights of importing parties during the transitional period covered by the ATC. Based on an objective assessment of the facts,[27] the United States believes that the

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[24] Market Statement, at ¶¶ 7.2-7.6, 8.8-8.10, Table II, Table III.

[25] Pakistan admits that it carries the burden of proof in this case. First Submission of Pakistan, at p. 18. *See United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, Report of the Appellate Body, 25 April 1997, at pp. 16, 19 ("Report of the Appellate Body, *United States – Wool Shirts*") ("[A] party claiming a violation of a provision of the *WTO Agreement* by another Member must assert and prove its claim.") Only after such a showing does the United States, as the party taking the transitional safeguard action, have the burden "to bring evidence and argument to rebut the presumption." Report of the Appellate Body, *United States - Wool Shirts*, at p. 16.

[26] First Written Submission of Pakistan, at p. 19.

[27] Pakistan agrees that, under Article 11 of the DSU, the Panel should not conduct a *de novo* review of the market situation but rather should review whether the U.S. safeguard restraint conforms with Article 6 of the ATC based on an objective assessment of matter before it, including the facts of the case and the applicability and conformity with the relevant provisions of the ATC. First Written Submission of Pakistan, at p. 16. *See United*

(continued...)

Panel should conclude that the United States acted consistently with the ATC in (i) defining the domestic combed cotton yarn for sale industry, (ii) determining that a sharp and substantial increase in imports of combed cotton yarn caused both serious damage and actual threat of serious damage to the industry, (iii) attributing the serious damage and actual threat of serious damage to the 283.2 percent surge of low-priced imports of combed cotton yarn from Pakistan, and (iv) relying on the best available and most up-to-date data.

A. *The United States Defined the Domestic Industry as the Combed Cotton Yarn for Sale Industry in Accordance with the ATC.*

32. In conducting its analysis under Article 6.2 of the ATC, the United States defined the "domestic industry producing like and/or directly competitive products" to be establishments engaged in the production of combed cotton yarn for sale.[28] Combed cotton yarn produced by these establishments competes directly with imported yarn sold to customers. The United States properly excluded from its analysis vertically integrated producers, which manufacture combed cotton yarn for their own consumption in the process of producing a subsequent product. Because vertically integrated facilities produce fabric (or apparel or home furnishings) rather than yarn as their final product for sale on the marketplace, they are part of the fabric (or apparel or home furnishings) industry *not* the yarn, industry.[29] For this reason, combed cotton yarn manufactured by these vertically integrated fabric producers for their own consumption does not compete with imported combed cotton yarn.

33. Pakistan alleges that the United States violated Article 6 of the ATC in defining the domestic industry to exclude vertically integrated fabric producers. Pakistan asserts that, by doing so, the United States failed to examine the state of the entire domestic industry producing combed cotton yarn. Pakistan contends that the ATC compels the United States to define the domestic industry in only one way, namely, to include *both* facilities producing yarn for sale on the open market *and* vertically integrated fabric producers manufacturing yarn for internal consumption.

34. Pakistan's contention is without support in the ATC. The approach the United States adopted in identifying the domestic industry is consistent with the text and purpose of the ATC and reflects the state of the domestic combed cotton yarn industry.

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[27] (...continued)
States – Restrictions on Imports of Cotton and Man-Made Fibre Underwear, 8 November 1996, WT/DS24/R, ¶ 7.13 (*"United States-Underwear"*), at ¶¶ 7.9, 7.13 *and United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, 6 January 1997, WT/DS33/R, at ¶ 7.16 (*"United States – Wool Shirts"*).

[28] Market Statement, at ¶ 1.3.

[29] In addition to fabric, vertically integrated establishments also may engage in the subsequent production of apparel or home furnishings. In such cases, they would be part of the apparel industry or home furnishings industry. For simplicity, this submission refers to vertical establishments generally as "vertically integrated fabric producers." *See infra* note 37 for a discussion of vertically integrated establishments.

1. *The U.S. Definition of the Domestic Industry Producing Like and/or Directly Competitive Products is Consistent with the ATC.*

35. The ATC does not define "domestic industry" for purposes of transitional safeguards taken under Article 6. The only guidance provided by the ATC to a Member in identifying a "domestic industry" appears in Article 6.2, which authorizes safeguard action when "on the basis of a determination by a Member, it is demonstrated that a particular product is being imported into its territory in such increased quantities as to cause serious damage or actual threat thereof, *to the domestic industry producing like and/or directly competitive products*." (emphasis supplied)

36. Any interpretation of "domestic industry producing like and/or directly competitive products" must be undertaken in light of the object and purpose of the ATC.[30]

a. The ATC and the Article 6 Transitional Safeguard Are Special and Unique.

37. The ATC, part of the Multilateral Trade Agreements under the World Trade Organization, is a special ten-year transitional agreement designed to gradually phase out the special regime that governed trade in the textile and apparel sector under the *Arrangement Regarding International Trade in Textiles and Clothing* (GATT Multifiber Arrangement) ("MFA") and gradually integrate the textiles and clothing sector into the disciplines of the GATT.

38. The ATC derives from no other WTO agreement; rather, the ATC is the carefully negotiated successor to the MFA. The origin of the MFA was based on the recognition that the textiles and clothing sector was unique and warranted special rules. Major textile exporting and importing countries recognized that "it may be desirable ... for special practical measures of international co-operation to be applied by the participating countries in the field of textiles with the aim of eliminating the difficulties that exist in this field."[31] Thus, participating countries agreed that special rules that departed from normal, otherwise applicable GATT rules, should govern the growth and expansion of trade in textiles and apparel.

39. These rules permitted the use of selective measures to counter market disruption, quantitative restrictions, and bilateral agreements to permit the orderly, non-disruptive development of trade in textiles and apparel. An important component of the MFA was its market disruption (or safeguard) provision, which provided for the application of country-by-country quantitative

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[30] Generally accepted principles of international law, reflected in Article 31of the *Vienna Convention on the Law of Treaties*, call for the interpretation of a treaty "...in good fath in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

[31] MFA, Art. 1.1.

restrictions when surges in imports of particular products caused, or threatened to cause, serious damage to the industry of the importing country.[32]

40. A key accomplishment of the Uruguay Round was the agreement to phase out the MFA.[33] The ATC was negotiated as the transitional arrangement that would gradually integrate the textiles and clothing sector into the "regular" rules of the GATT, as strengthened in the Uruguay Round negotiations. Once trade in textiles and clothing is integrated into the multilateral trading system, the ATC will terminate.[34]

41. While specific and important differences exist between the two agreements, negotiators based the ATC fundamentally on the MFA regime, rules and structure so that the transition of the textiles and clothing sector to GATT 1994 could occur with as much certainty, transparency and predictability as possible. In other words, the MFA – rather than the GATT or any other agreement – served as the model for the ATC.

42. One of the principal carryovers from the MFA is the special, bilateral safeguard mechanism. As under the MFA, Article 6 of the ATC protects importing Members during the transition period against damaging surges in imports from a particular Member of products that have not yet been integrated into GATT. To reflect the uniqueness of a *transitional*, *bilateral* safeguard for *non-integrated* textile products, the negotiators based the text and procedures of Article 6 on analogous provisions in the MFA rather than on non-transitional agreements for products already covered by GATT disciplines.

43. Therefore, the ATC – and particularly the Article 6 transitional safeguard mechanism – set forth a careful balancing of interests between exporting and importing Members. On the one hand, exporting Members have security that, at the end of the ten years, all textile products will be subject to normal GATT rules. On the other hand, importing Members have protection against damaging surges in imports during the transition period from products which have not yet been integrated into GATT disciplines. As the Appellate Body stated, Article 6 of the ATC is "a fundamental part of the rights and obligations of WTO Members concerning non-integrated textile and clothing products covered by the ATC during the transitional period" and represents "'carefully negotiated language...[reflecting] an equally carefully drawn balance of rights and obligations of Members.' [footnote omitted]."[35]

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[32] MFA, Art. 3, Annex A.

[33] Marcelo Raffaelli and Tripti Jenkins called this "no small accomplishment." Raffaelli and Jenkins, *Drafting History of the Agreement on Textiles and Clothing*, 1995, at ix ("Raffaelli and Jenkins").

[34] Report of the Appellate Body, *United States - Wool Shirts*, at p. 19.

[35] Report of the Appellate Body, *United States - Wool Shirts*, at p. 19, quoting *United States - Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/AB/R, 25 February 1997, at p. 15.

b. The U.S. Decision to Exclude Vertically Integrated Fabric Producers from the Definition of Domestic Industry Accords with the Text and Unique Purpose of the ATC.

44. As discussed above, the United States defined the domestic industry as the combed cotton yarn for sale industry and excluded from this definition vertically integrated fabric producers. The U.S. identification of the "domestic industry producing like and/or directly competitive products" is fully consistent with the text and unique purpose of the ATC.

45. The *combed cotton yarn for sale industry produces combed cotton yarn for sale* to weavers or knitters that purchase yarn rather than produce their own. Indeed, "sales yarn," as defined by *Fairchild's Dictionary of Textiles*, is "a trade term for yarn produced by a spinning company whose business is exclusively to spin yarn for weavers, knitters, and other manufacturers."[36] Yarn is the final output of a sales yarn facility, and yarn is the product that these facilities sell in the marketplace in competition with other domestic yarn for sale manufacturers and imports.

46. In contrast, *vertically integrated fabric establishments produce fabric* – not yarn – as their final product for sale on the marketplace. These fabric producers manufacture yarn for their own internal consumption in the production of another, downstream, product. This yarn is not intended to be sold on the market, and hence does not compete with imports. For these reasons, vertically integrated fabric producers are part of the fabric – not yarn – industry.[37]

47. For purposes of an Article 6 analysis, this distinction is critical. Article 6.3 requires the Member considering the imposition of a transitional safeguard to examine eleven specific factors in making a determination of serious damage or actual threat of serious damage, including: output, inventories, market share, and prices. No meaningful Article 6 analysis of these factors as they relate to Category 301 yarn could be undertaken for integrated fabric producers.

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[36] Phyllis G. Tortora and Robert S. Merkel, Fairchild's Dictionary of Textiles, (7th ed, 1996), p. 485.

[37] A vertically integrated facility is common to the manufacturing structure in many industries. The *Dictionary of Business and Management* defines "vertically combined (integrated)" as "describing a business firm that performs all the various stages of production *of a single finished item*." Jerry M. Rosenberg, Ph.D., *Dictionary of Business and Management*, (2nd ed. 1983), p. 523. *The MIT Dictionary of Modern Economics* defines "vertical integration" as:

> A situation where the activities of a firm extend over more than one successive stage in the production process of transforming raw materials into final goods... Motives commonly adduced for such integration are the reduction in working capital requirements, elimination of prohibitory transaction costs, [and] greater price competitiveness as a consequence of avoiding successive profit mark-ups...

David W. Pearce (ed.), *The MIT Dictionary of Modern Economics*, (4th ed. 1992), p. 450.

48. Producers of combed cotton yarn for sale have production, inventories, orders, sales and price for the yarn the produce and sell on the market. In contrast, many of the economic variables contained in Article 6.3 do not apply to vertically integrated fabric producers which manufacture yarn for their own consumption. The yarn manufactured by vertically integrated fabric producers for internal consumption is not generally "exchanged" on the marketplace.[38] Such establishments have no meaningful sales of yarn. They do not take orders for yarn. They have no price for yarn. They manufacture yarn but do not maintain a sales inventory of yarn. Therefore, it would be impossible for an importing Member to examine many of the mandatory factors enumerated in Article 6.3 for vertically integrated fabric producers.

49. The ATC further requires a focus on the domestic industry "producing like and/or directly competitive products." Read alone, this language would allow a Member to identify an industry producing a product that is: 1) like and directly competitive; 2) like but not directly competitive; or 3) unlike but directly competitive. Accordingly, the U.S. identification of the domestic industry as the combed cotton yarn for sale industry is permissible. Combed cotton yarn for sale is "like and directly competitive" with Category 301 imports from Pakistan.

50. The context of Article 6 provides further justification for the U.S. approach. The special safeguard provision of Article 6 affords importing Members a mechanism to address serious damage and/or actual threat of serious damage to its domestic industry caused by a sharp and substantial increases in *imports*. But, if the products of domestic producers are *not* directly competitive with imports – such as in the case of yarn manufactured by vertically integrated fabric producers for their own consumption – the need for safeguard action would not arise.

51. Moreover, only yarn produced by the combed cotton yarn for sale industry is "directly competitive" with imported yarn from Pakistan. Yarn manufactured by vertically integrated fabric producers for their internal consumption is not released onto the market and, accordingly, is not "directly competitive" with imported yarn.

52. Therefore, the text of Article 6, when interpreted in the context of the object and purpose of the ATC, gives competent national authorities the ability to focus on industries producing products that are like *and* directly competitive with the imported product or products that are unlike *but* directly competitive. In other words, the U.S. decision to exclude vertically integrated fabric producers from the domestic industry is fully consistent with the text and purpose of the ATC.

53. The United States notes that in April 1998 – eight months before the U.S. request for consultations with Pakistan on Category 301 imports – the TMB accepted as consistent with

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[38] As explained in the *Handbook of Industrial Organization*, "inherent in the notion of vertical integration is the *elimination* of contractual or *market exchanges*, and the substitution of internal exchanges within the boundaries of the firm." Martin K. Perry, "Vertical Integration: Determinants and Effects," *Handbook of Industrial Organization*, Volume 2, (Richard Schmalensee, & Robert D. Willig eds., Volume 2, 1989), p. 185.

Article 6 of the ATC a transitional safeguard based on the identical approach of excluding vertically integrated fabric producers from the definition of like and/or directly competitive products.[39] In that case, which related to imports of Category 603 yarn from Thailand, the United States identified the industry producing "like and/or directly competitive products" as the "for sale" industry and excluded from its analysis vertically integrated facilities. The TMB weighed the competing arguments in favor of and against such an approach and ultimately approved the transitional safeguard as consistent with Article 6.

54. In reaching its decision finding the U.S. restraint against Thailand justified, the TMB observed:

> [T]he yarn produced by the vertically integrated firms was not sold in the "yarn for sale" market in competition with the yarn produced by the "yarn for sale" producers. Instead, the vertically integrated firms produced yarn for their own use only, and also purchased a small amount of yarn from the "for sale" market. ... *The vertically integrated firms did not sell the yarn they produced on the domestic market, and it could be contended that their production did not compete directly with imports on the US' "yarn for sale" market... Any evidence of serious damage caused by imports would, therefore, reflect essentially the situation in the domestic industry producing yarn for sale...*[40] (emphasis supplied)

55. Therefore, given that the TMB – in its consideration of a previous Article 6 safeguard – validated the U.S. practice of distinguishing between yarn manufactured by vertically integrated fabric producers for their own use and yarn produced by "for sale" mills, the United States reasonably approached the definition of industry in this case in a similar manner.

56. For all the above reasons, the U.S. approach to the identification of the domestic industry for purposes of its Article 6 analysis was fully consistent with the ATC and is reasonable and appropriate in light of its purposes. Pakistan's contention otherwise amounts to suggesting that Article 6 requires a Member to focus on domestic industries manufacutring products that do not even compete with imports. Neither the text nor the purpose of the ATC support Pakistan's claim, and the Panel should reject it accordingly.

2. *The Meaning of 'Domestic Industry' for Purposes of the ATC Cannot Be Ascertained by Reference to Other WTO Agreements.*

57. Pakistan's claim that the ATC requires the United States to define "domestic industry" to include vertically integrated fabric producers which manufacture combed cotton yarn for their internal consumption is based on the false assumption that Article 6 transitional safeguards can

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[39] "Report of the Forty-Third Meeting," G/TMB/R/42, 5 June 1998, attached as U.S. Exhibit 7 ("U.S.-7").

[40] G/TMB/R/42, at ¶¶ 8-9.

and must be interpreted in light of other WTO Agreements. Pakistan wrongly asserts that "[t]here is no reason why the issue of market segmentation in the case of a safeguard action under Article 6 of the ATC should be resolved differently than in the cases of safeguard actions under Article XIX of the GATT and countervailing and antidumping measures."[41]

58. Based on the unique purpose and transitional nature of the ATC and its safeguard provision, the Panel should look to the ATC, not other WTO agreements, to interpret Article 6 for non-integrated textile and clothing products. As discussed *supra* part IV.A.1.a, the purpose of the ATC and its rights, disciplines and obligations are different from those of non-transitional WTO agreements – such as the *Agreement on Safeguards* ("Safeguards Agreement"), the *Agreement on Subsidies and Countervailing Measures* (the "SCM Agreement), or the *Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "Anti-Dumping Agreement"). Even Pakistan recognizes that the ATC and Article 6 are different from other WTO Agreements: "Article 6 can therefore be described as a safeguard clause within a safeguard agreement, or as an exception within an exception."[42]

59. Moreover, these other, non-transitional agreements differ significantly from the ATC not just in purpose but also in the specific manner in which they address the notion of "domestic industry." The Anti-Dumping and SCM Agreements define "domestic industry" as the "domestic producers *as a whole* of the like products."[43] Article XIX of GATT refers to "domestic producers,"[44] and the Safeguards Agreement defines "domestic industry" as "producers *as a whole* of the like or directly competitive products."[45] The Anti-Dumping Agreement and SCM Agreements refer to "like products,"[46] and the Anti-Dumping Agreement defines that term to mean a product that is identical.[47]

60. By contrast, the ATC does not define "domestic industry"and makes no reference to "domestic producers."[48] The ATC merely refers to "the domestic industry producing like and/or directly competitive products." The ATC negotiators did not embrace the terminology of either Article XIX of the GATT or other WTO Agreements. Rather, the ATC negotiators drew from

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[41] First Written Submission of Pakistan, at p.26.

[42] First Written Submission of Pakistan, at p. 14.

[43] Anti-Dumping Agreement, Art. 4.1; SCM Agreement, Art., 16.1. (emphasis supplied)

[44] GATT 1994, Art. XIX.

[45] Safeguards Agreement, Art. 4(1)(c). (emphasis supplied)

[46] SCM Agreement, Art. 15.1; Anti-Dumping Agreement, Art. 3.

[47] Anti-Dumping Agreement, Art 2.7.

[48] Pakistan states, but does not argue, that the ATC requires consideration of the *entire* industry. *See* First Written Submission of Pakistan, at 5, 25, 27.

the MFA, choosing to refer simply to the "domestic industry" and to use the MFA's exact phrase of "like and/or directly competitive products."[49]

61. The clear textual differences between the ATC and the non-transitional WTO agreements – and the clear similarities between the ATC and the MFA – strongly indicate that the ATC negotiators intended to use different language from Article XIX of GATT, the Safeguards Agreement, and the Anti-Dumping Agreement for a reason. This is consistent with the role of the ATC as the successor agreement to the MFA, which itself had recognized the "volatile and continually evolving nature of production and trade in textile products" and the "serious economic and social problems as exist in this field in both importing and exporting countries."[50] Moreover, if there had been no intent to create a difference between the transitional safeguard of the ATC and the Safeguards Agreement, the negotiators would not have included a safeguard provision in the ATC; rather they would have relied on Article XIX of the GATT and the Safeguards Agreement.[51]

62. As reflected in its language and provisions, the ATC has a very different object and purpose than these other non-transitional WTO agreements. Accordingly, the Panel should rely on the ATC – not other WTO agreements – in conducting its analysis.

63. For this reason, Pakistan's reliance on the U.S. argument in the *Mexico - Antidumping Investigations on High-Fructose Corn Syrup for the United States*, a dispute under the Anti-Dumping Agreement, to support its position is misplaced.[52] In that case, the United States based its argument on the particular provisions of the Anti-Dumping Agreement. For this reason alone, the panel should disregard Pakistan's argument based on *Mexico – High-Fructose Corn Syrup*.

64. However, if the Panel were to consider the U.S. position in this anti-dumping dispute relevant, it should note that the situation of *Mexico – High-Fructose Corn Syrup* is fundamentally different from this dispute. In *Mexico – High-Fructose Corn Syrup*, Mexico had

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[49] MFA, Annex A reads, in relevant part: "[s]uch damage must demonstrably be caused by the factors set out in paragraph II below and not by factors such as technological changes or changes in consumer preference which are instrumental in switches to *like and/or directly competitive products* made by the same industry, or similar factors." (emphasis supplied)

[50] MFA, Preamble.

[51] The ATC's safeguard mechanism differs from that in the Safeguards Agreement in other respects as well. For example, the Safeguards Agreement states that "[a] member may apply a safeguard measure to a product *only if* that Member has determined...that such a product is being imported into its territory in such increased quantities...as to cause or threaten to cause serious injury to the domestic industry." (emphasis supplied). Although Pakistan would have this Panel think otherwise, the ATC merely states that a "[s]afeguard action may be taken...when, on the basis of a determination by the Member, it is demonstrated that a particular product is being imported into its territory in such increased quantities as to cause serious damage or actual threat thereof ...". The words "only if" do not appear in the ATC.

[52] First Written Submission of Pakistan, at p. 26. *Mexico - Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, 28 January 2000 ("*Mexico - HFCS*").

identified the domestic industry to include production of all sugar but then analyzed the effects of imports only in terms of part of that production – by considering only sales to industry and excluding sales to household users. In other words, Mexico "...simply failed to address the question of the threat of injury to the industry it had defined as the relevant industry."[53]

65. In contrast, in this case, the United States considered all sales of combed cotton yarn in its analysis of serious damage – including the *de minimis* amount sold by vertically integrated facilities on the open market.[54] The only yarn the United States excluded is yarn that never enters the open market and never competes with imports, and is therefore not produced by the defined domestic industry in this case. This is a crucial, underlying factual difference which clearly distinguishes *Mexico – High-Fructose Corn Syrup* from the U.S. safeguard action on combed cotton yarn from Pakistan.

3. *Pakistan's Other Criticisms of the U.S. Definition of the Domestic Industry Make Incorrect Assumptions and Fail to Allege Any Violation of the ATC.*

66. Pakistan's other objections to the U.S. definition of the domestic industry are also unfounded. Essentially, Pakistan argues that, even if the United States acted consistently with the ATC in defining the "yarn for sale" industry, the United States, in fact, did not consider all of that industry in its Article 6 analysis because it (i) failed to account for the *de minimis* amounts of excess production of combed cotton yarn that vertically integrated firms may have sold on the merchant market, (ii) failed to account for the *de minimis* amounts of imported combed cotton yarn that vertically integrated firms may have purchased from the merchant market, and (iii) mistakenly relied on AYSA membership as representative of the defined yarn for sale industry. As discussed below, Pakistan's claims do not withstand careful scrutiny.

67. First, Pakistan mistakenly assumes that, because the United States did not consider the yarn produced by integrated mills *for their own use* in its examination, the United States also did not consider the *de minimis* amounts of yarn sold by vertically integrated fabric producers on the open market.[55]

68. This assumption is incorrect. The United States considered *all* yarn sold on the open market – whether it was produced by "for sale" producers or vertically integrated fabric producers given that it is this yarn that competes with imports on the open market.

69. With very limited exceptions, integrated facilities consume the combed cotton yarn they produce in their subsequent production of fabric. In the Market Statement, the United States

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[53] First Written Submission of Pakistan, at 26, citing *Mexico - HFCS*, at ¶ 7.145.

[54] As discussed *infra* at section IV.A.3, vertically integrated manufacturers sometimes produce *de minimis* amounts of yarn for sale. Contrary to Pakistan's assertion, the United States accounted for this *de minimis* amount as "yarn for sale" in conducting its analysis.

[55] First Written Submission of Pakistan, at pp. 27-28.

explained that vertically integrated fabric producers sometimes sell excess production of combed cotton yarn on the open market and, on rare occasions, may purchase outside yarn.[56] These amounts however are *de minimis*. Pakistan has raised questions about how and whether the United States verified this information.[57] In response to similar questions raised by Pakistan during the TMB process, the United States conducted a representative survey of eight large integrated mills and concluded that vertically integrated fabric producers purchase roughly *two percent* of their consumption of combed cotton yarn from the market and sell roughly *one percent* of their production on the open market.[58] Pakistan offers no reason to question the validity of this approach or to call into question the results of the U.S. survey.

70. Pakistan claims that the United States should have separated out the sales of integrated mills in the merchant market.[59] This assertion is misleading given that official U.S. production statistics account for the *de minimis* amount of yarn sold by vertically integrated fabric producers. Based on a survey submitted to industry participants,[60] the U.S. Bureau of the Census collects separate statistics on (i) yarn *for sale* and (ii) yarn produced for a mill's *own use*. These statistics specifically include an integrated firm's sales on the open market in the "for sale" category.[61] Therefore, *all* yarn sold into the market – no matter how *de minimis* – is recorded as yarn for sale *regardless* of the identity of the producer.

71. Second, Pakistan claims that the United States "did not distinguish between imports destined for the merchant market and imports destined for the captive market."[62] However, there was no need to make such a distinction. As the United States explained in the Market Statement, vertically integrated establishments purchase less than five percent of their consumption from the for sale market [63] – which includes both imports and domestic production. Therefore, this figure includes any imports that integrated producers may purchase on the for sale market. In other

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[56] In the Market Statement, the United States stated that it had verified that less than five percent of the integrated sector's yarn consumption was purchased from the "for sale" market during the period covered by the investigation. Market Statement, Appendix I.

[57] First Written Submission of Pakistan, at p. 28.

[58] Response of the United States Pursuant to Article 8.10 of the ATC to the TMB Recommendation Regarding the Article 6 Safeguard Measure Concerning Imports of Category 301 Products from Pakistan, 29 May 1999, attached to Pakistan's First Written Submission as exhibit PAK-5.

[59] First Written Submission of Pakistan, at p. 29.

[60] This survey is Form MA313F and is attached as U.S. Exhibit 8 ("U.S.-8")

[61] Specifically, "sales yarn" and yarn produced "for own use" are and have been since at least 1959 reported to and published by the U.S. Bureau of the Census, as separate and distinct categories in the annual *Current Industrial Reports* of manufacturing activities in the United States. Excerpts from the 1997 *Current Industrial Reports* are attached as U.S. Exhibit 9 ("U.S.-9").

[62] First Written Submission of Pakistan, at p. 21.

[63] Market Statement, at Appendix I. As discussed above, subsequent verification of this figure revealed that integrated establishments purchase no more than *two* percent of their consumption of combed cotton yarn in the for sale market.

words, the amount of *imported* combed cotton yarn that a vertically integrated fabric producer may purchase constitutes a subset of the already *de minimis* amount of yarn that they purchase on the open market.[64] Even if the *de minimis* imports were excluded from the import figures used in the analysis of serious damage, the results would not have been statistically significant.

72. Third, Pakistan alleges that the United States mistakenly relied on the membership of AYSA as fully representative of the defined yarn for sale industry.[65] According to Pakistan, that membership is not representative of this industry because it includes vertically integrated firms. As such, Pakistan asserts the surveys that AYSA conducted among its members, on which the United States relied, must have included data supplied by such integrated units.

73. AYSA is the national trade association for the sales yarn industry and does not represent the interests of vertically integrated fabric producers manufacturing combed cotton yarn for their own consumption. AYSA membership includes five firms that produce fabric and yarn for sale *in separate divisions*. Each separate division represents a distinct profit center within the corporation. Each division would also report its production data separately.[66] Therefore, the inclusion of these five firms in the AYSA survey was appropriate because, although these sales yarn establishments share a corporate parent with fabric establishments, their production of sales yarn is *separate* from and not for the exclusive use of their sister vertically integrated fabric establishments. Thus, the separate yarn for sale divisions of the five producers included in AYSA's membership are legitimately part of the defined yarn for sale industry.

74. In sum, Pakistan's criticisms of the U.S. industry definition fail to establish any violation of the ATC. Rather, they demonstrate a misunderstanding of the ATC, its uniqueness as a transitional agreement, and the fact that the yarn for sale industry is separate and distinct from vertically integrated producers of fabric.

B. ***The United States Determined That a Surge in Category 301 Imports Had Caused Serious Damage to the Domestic Industry In Accordance With Article 6 of the ATC.***

75. Pakistan fails to establish that the United States did not meet the requirements under Articles 6.2 and 6.3 of the ATC in reaching the conclusion that imports of combed cotton yarn caused

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[64] Pakistan suggests, without any specificity, that there may be a foreign producer owned by a U.S. vertically integrated producer that was not accounted for in the U.S. analysis. Even if this were true, those imports would only account for a subset of the subset of the already *de minimis* amount of combed cotton yarn purchased by a vertically integrated fabric producer on the open market.

[65] First Written Submission of Pakistan, at p. 29.

[66] In other words, the hypothetical division that produces yarn for sale would report its yarn as yarn *for sale*. Its sister fabric division, with its distinct management structure, might be a vertically integrated establishment. If so, it would report its yarn production as yarn for its own use (except for those *de minimis* amounts that are sold and reported as yarn for sale).

serious damage to the domestic industry. Pakistan's inability to establish a violation is not surprising given the clear showing of serious damage in the Market Statement.

76. Articles 6.2 and 6.3 of the ATC impose certain conditions a Member must follow in reaching its determination "that a particular product is being imported into its territory in such increased quantities as to cause serious damage, or actual threat thereof, to the domestic industry producing like and/or directly competitive products."[67] Article 6.2 requires that the Member must demonstrate that the serious damage or actual threat thereof is caused by "increased quantities in total imports of the like and/or directly competitive product and not by such other factors as technological changes or changes in consumer preference."

77. Article 6.3 requires the Member, in making the determination of serious damage or actual threat thereof "to examine the effect of those imports on the state of the particular industry" in light of "changes in such relevant economic variables as output, productivity, utilization of capacity, inventories, market share, exports, wages, employment, domestic prices, profits and investment; none of which, either alone or combined with other factors, can necessarily give decisive guidance."

78. In interpreting these provisions, the Panel in *United States - Wool Shirts* set forth a two-pronged test for analyzing whether the importing Member properly determined that increased imports were causing serious damage to the domestic industry:

> The importing Member must...comply in its determination with the requirements that (i) at least all economic facts listed in Article 6.3 are 'considered'..., and (ii) the importing Member meet the explicit requirement to confirm that the increase in imports is the cause of the serious damage or actual threat thereof to the particular domestic industry and that the state of that industry is not caused by such other factors as technological changes or changes in consumer preferences.[68]

79. As discussed below, the United States fulfilled both requirements.

1. *The United States Carefully Analyzed the Relevant Economic Factors in its Assessment Of Serious Damage – Including All Eleven Variables Listed in Article 6.3 of the ATC – and Correctly Concluded that the Surge in Imports Caused Serious Damage to the Domestic Industry.*

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[67] Although the analyses of "serious damage" and "actual threat of serious damage" rely on similar data, the United States conducted a separate examination of "actual threat of serious damage." Accordingly, this submission addresses serious damage in this section and discusses actual threat of serious damage *infra* part IV.C.

[68] *United States - Wool Shirts*, at ¶ 7.52.

80. The Market Statement clearly establishes sharp increases in the import of the combed cotton yarn and the effect of these increased imports on the eleven variables enumerated in Article 6.3 of the ATC, as well as additional variables that the United States identified as relevant and material.[69]

81. The U.S. investigation conclusively demonstrated that imports from all sources increased by over 90 percent during the period of January-August 1998 as compared to January-August 1997. In other words, total imports of combed cotton yarn into the United States nearly doubled in less than a year's time. Imports from Pakistan, the second largest supplier to the United States, nearly *quadrupled*, increasing 283.2 percent in the same period. And the price of imported combed cotton yarn – particularly from Pakistan – was significantly below the average U.S. price of combed cotton yarn for sale.[70]

82. The impact of these surges of low-cost imports on U.S. industry was unmistakably serious damage, and the evidence is clear-cut and striking. As these imports were surging during the relevant time period, the economic variables set out in Article 6.3 deteriorated substantially: U.S. *domestic production* dropped 10.2 percent, *shipments* declined 14.2 percent, *productivity* lagged 4 percent, *capacity utilization* declined, *inventories* increased 145.9 percent, the *share of the market* held by U.S. producers contracted 10 percentage points, *exports* fell by one-third, 6.6 percent of the production *workforce* lost their jobs in the industry, *profitability* was nearly cut in half, and *investment* stagnated. Two mills closed during this eight-month period.

83. The United States also examined other factors that it considered to be material in its analysis of serious damage and found that *unfilled orders* declined 15.8 percent, the *number of man-hours worked* declined by 6.6 percent; the *apparent domestic market* (which is an indicator of consumer preference) remained constant; and the *ratio of imports to domestic production* more than doubled.

84. Every relevant economic indicator, taken individually, shows an industry irrefutably in a state of serious damage resulting from import surges. Taken collectively, the indicators define a state of serious damage. With this evidence, it is hard to draw any conclusion other than that the domestic industry was in immediate peril and had suffered serious damage during the period analyzed in the U.S. investigation. Pakistan leaves this clear record of serious damage caused by the import surge unchallenged.

2. *The United States Demonstrated that Increased Imports – Not Other Factors – Caused Serious Damage to the Domestic Industry Producing Like and/or Directly Competitive Products.*

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[69] Market Statement, at ¶¶ 5.1-5.22.

[70] Market Statement, at ¶¶ 5.21-5.22.

85. As required by Article 6.2, the United States also examined whether factors other than the substantial increase in imports (such as technological changes or changes in consumer preference) caused the serious damage to the industry. The United States noted that the "apparent domestic market" remained relatively constant during the investigation period, while imports were taking a greater share. Accordingly, the United States concluded that there was no change in consumer preferences that could account for the serious damage to the domestic combed cotton yarn for sale industry. Likewise, the United States concluded that technological changes could not account for the serious damage given that there had not been any significant new technological changes in the defined industry during the period covered by the investigation.[71]

86. Pakistan does not contest this finding.

87. In sum, based on an objective assessment of the facts, the Panel should conclude that the United States reasonably determined that the 91.3 percent surge in imports caused serious damage to the domestic industry producing like and/or directly competitive products. The record reflects that the United States carefully considered the effect of this import surge on each factor enumerated in Article 6.3 in addition to other variables. The United States also analyzed the status of the market during the investigation period to assess whether factors – other than imports – had contributed to the imminent peril faced by the industry.

3. *Pakistan Fails to Demonstrate that the U.S. Determination of Serious Damage to the Domestic Industry From Imports Was Inconsistent with the ATC.*

88. Pakistan challenges the U.S. causation analysis with a series of assertions which fail to allege violation of U.S. obligations under the ATC. Rather, as throughout its submission, Pakistan attempts to distract attention from the matter at issue in this dispute and the facts available to the United States at the time it prepared the Market Statement. Pakistan appears to take such an approach in an effort to encourage the Panel to reopen the safeguard investigation conducted by the United States and reinvestigate the market situation. Pakistan admits that its objective is "not merely the removal of this safeguard measure" but rather to encourage the Panel to "... rule on all inconsistencies that occurred in the present investigation *and could easily reoccur in a future investigation* ...".[72] (emphasis supplied). Pakistan appears to misunderstand the purpose of dispute settlement and asks the Panel to go beyond the matter at issue, make findings on each and every claim brought by Pakistan, and issue advisory opinions with respect to a hypothetical future dispute about measures not even in existence.

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[71] Market Statement, at ¶ 6.7.

[72] First Written Submission of Pakistan, at p. 20.

89. There is no basis in the DSU for the panel to go to the lengths requested by Pakistan. In fact, this is not the role of the Panel. The Panel in *United States - Wool Shirts* observed that the function of the Panel:

> ... is limited to making an objective assessment of the facts surrounding the application of the specific restraint...and of the conformity of such restraint with the relevant WTO agreements ... [and, in discussing the differences between a DSU panel and the TMB] ... is not called upon, under its terms of reference to reinvestigate the market situation. When assessing the WTO compatibility of the decision to impose national trade remedies, DSU panels do not reinvestigate the market situation but rather limit themselves to the evidence used by the importing Member in making its determination to impose the measure. In addition, such DSU panels, contrary to the TMB, do not consider developments subsequent to the initial determination[73]

90. In addition, the Panel in *United States - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, a decision to which Pakistan refers in its submission[74] but fails to fully cite, stated that:

> [w]e do not see our review as a substitute for the investigation conducted by the USITC. Our role is limited to a review of the consistency of the United States measure with the Agreement of Safeguards...Within [that] framework...it is for the USITC to determine how to collect and evaluate data and how to assess and weigh the relevant factors in making determinations of serious injury and causation. *It is not our role to collect new data, nor to consider evidence which could have been presented to the USITC by interested parties in the investigation, but was not*...It was therefore not necessary for us to consider whether or not to refer to pricing data outside the USITC record in reaching our determination [footnote omitted].[75] (emphasis supplied)

91. Therefore, in evaluating Pakistan's arguments regarding these and other claims, the Panel should refrain from reinvestigating the market situation and considering new evidence introduced by Pakistan.

a. Other WTO Agreements Should Not Inform the Causation Analysis Required Under the ATC.

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[73] *United States -Wool Shirts*, at ¶¶ 7.17, 7.21.

[74] First Written Submission of Pakistan, at p. 16.

[75] *United States - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/R, 31 July 2000, at ¶ 8.6.

92. Pakistan suggests that the Panel look to other WTO Agreements to inform both its causation analysis and the specific minimum period for which data must be collected. Pakistan provides no basis for these claims other than asserting that decisions on other agreements are "equally relevant"[76] to the causation analysis under the ATC or that time periods from other agreements provide "useful benchmarks"[77] for purposes of Article 6. The United States will address each argument in turn.

93. First, Pakistan asserts that the United States "was required to examine the relationship between an upward trend in imports and negative trends in economic variables" and invites the Panel to apply the causation analysis under the Safeguards Agreement to its assessment of causation under the ATC.[78] Pakistan provides no support for its claim other than referencing panel and Appellate Body interpretations of the Safeguards Agreement. As is plain from the text, the ATC and Safeguards Agreement were drafted in different ways and use different language.[79] And as already discussed, the ATC has a fundamentally different purpose from other non-transitional WTO agreements.[80] Even Pakistan admits that "[t]he requirements for safeguard action under the Agreement on Safeguards are not identical to those taken under the ATC."[81]

94. As set forth conclusively in the Market Statement, the United States established that imports from Pakistan were surging *at the same time that* conditions in the industry were deteriorating. As discussed above, the United States demonstrated that, during the period between January-August 1997 and January-August 1998, imports from all sources increased by over 91.3 percent and imports from Pakistan surged by 283.2 percent. At the same time, all relevant economic variables set forth in Article 6.3 of the ATC deteriorated: production dropped 10.2 percent, shipments declined 14.2 percent, domestic market contracted by 10 percentage points, unfilled

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[76] First Written Submission of Pakistan, at p. 37.

[77] First Written Submission of Pakistan, at p. 37.

[78] First Written Submission of Pakistan, at pp. 36-37.

[79] Article 4.2(a) of the Safeguards Agreement requires competent authorities to "evaluate *all relevant factors of an objective and quantifiable nature* having a bearing on the situation of that industry..." Article 4.2(b) of the Safeguards Agreement states that "[t]he determination...*shall not be made unless* this investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof." Article 6.2 and Article 6.3 of the ATC set forth a separate causation analysis: "[s]erious damage or actual threat thereof must demonstrably be caused by such increased quantities in total imports of that product and not by such other factors as technological changes or changes in consumer preference...In making a determination...the Member shall examine the effect of those imports on the state of the particular industry, as reflected in changes in such relevant economic variables as [the factors listed in Article 6.3]...none of which, either alone or combined with other factors, can necessarily give decisive guidance."

[80] *See supra* at IV.A.1.a and IV.A.2.

[81] First Written Submission of Pakistan, at p. 37.

orders fell 15.8 percent, inventories increased by 145.9 percent, and two mills exited the industry.[82]

95. Therefore, based on an objective assessment of the facts, United States properly examined "the relationship between an upward trend in imports and negative trends in economic variables" and reasonably determined concluded, based on this analysis, that the surge in imports of Category 301 combed cotton yarn caused serious damage to the domestic industry.

96. Second, Pakistan asserts that the three-five year periods "commonly used for anti-dumping and Article XIX actions provide useful benchmarks."[83] However, Pakistan provides no legal basis for this claim.

97. Pakistan admits that Article 6 of the ATC does not impose a "specific minimum period for which data must be collected..."[84] However, Article 6 strongly implies that a 12-month period for data collection would be appropriate. Article 6.7 requires that information is "...as up-to-date as possible and... related, as closely as possible, to identifiable segments of production and to the reference period set out in paragraph 8." Article 6.8 establishes this reference period as the "...12-month period terminating two months preceding the month in which the request for consultations was made."[85]

98. In other words, Article 6 suggests that the data collected for the Market Statement must relate as closely as possible to the 12-month period before the U.S. request for consultations with Pakistan over its intention to impose a restraint on Category 301 imports. The Market Statement reflected comprehensive data for two-years and eight-months – from January 1, 1996 through August 1998, and included import data through October 1998.

99. Unlike the Safeguards and Anti-Dumping Agreements, the ATC is a special, transitional agreement in effect between 1995 and 2004. Time periods that may be relevant under permanent agreements should not apply to an agreement with a 10-year life span that expires in 2004. By urging the Panel to impute interpretations of other agreements into the ATC, Pakistan is attempting to upset "carefully drawn balance of rights and obligations of Members"[86] struck in Article 6 of the ATC. The Panel should reject these efforts.

b. <u>The United States Analyzed Data for a Sufficient Period of Time and Presented Data in an Appropriate Manner.</u>

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[82] *See infra* part IV.B.1 *and* Market Statement, at ¶¶ 6.1-6.7.

[83] First Written Submission of Pakistan, at pp. 37-38.

[84] First Written Submission of Pakistan, at p. 37.

[85] The "request for consultations" mentioned in Articles 6.7 and 6.8 refers to the importing Party's request for consultations with the Member which would be affected by the importing Party's safeguard action.

[86] Report of the Appellate Body, *United States - Wool Shirts*, at p. 19.

100. Pakistan claims that the United States considered data using a shorter time-period than envisaged in the ATC, and, thus, failed to properly establish causation. Neither the ATC nor the Market Statement support this claim.

101. The ATC does not establish a specific minimum time period during which the importing Member must analyze the data it collected during the investigation. Nor does the ATC require the data to be presented in a particular fashion. Rather, Article 6.7 of the ATC only requires that the Member proposing to take safeguard action provide specific, relevant factual information as up-to-date as possible, and that the information relate "as closely as possible" to the 12-month time frame referenced in Article 6.8.

102. The United States satisfied these requirements. The United States prepared the Market Statement, reflecting comprehensive data from 1996, 1997, and the first eight months of 1998, and included import data through October 1998. At the time of the U.S. request for consultations, this data constituted the most up-to-date data available.

103. It is unreasonable to expect that an investigation supporting a request for consultation made in December 1998 could have collected more up-to-date data. Aside from import data, which is generated on a monthly basis, the economic variables assessed in the Market Statement are not regularly compiled and must be specially collected by the industry for the investigation. Once collected, the information must be compiled by the industry, shared with the U.S. Government, and verified and analyzed by U.S. Government experts. The four-month lag in the information presented in the Market Statement is the *minimum* lag that can be reasonably expected and is entirely consistent with the ATC requirement that it be "as up-to-date as possible." Therefore, the Market Statement reflects the latest available data, which for imports was current through October 1998, and for the other variables was current through August 1998.

104. The eight-month, January-August format used by the United States to present this data was reasonable and consistent with a format previously endorsed by the TMB[87] In its review of Colombia's notification regarding imports of plain polyester filaments from Korea and Thailand, the TMB noted that it "could not base its assessment on estimates provided by Colombia for the year 1998; and that the monthly averages provided by Colombia could not be considered in most cases as providing reliable indications."[88] The TMB stated, "for data to be meaningful, Colombia would have had in the present case to have provided comparisons *either on a January/May basis or on a year-ending basis*."[89] (emphasis supplied)

105. Faced with two choices deemed appropriate by the TMB, the United States concluded that presenting the information for the first eight months of 1998 was the better approach.

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[87] "Fiftieth Meeting of the TMB: Note by the Chairman," G/TMB/16, 27 November 1998.

[88] G/TMB/16, at ¶ 16.

[89] G/TMB/16, at ¶ 16.

Presenting the data using the year-ending August approach would have necessitated an overlap of four months with information presented for the full year 1997 and would have resulted in an unclear picture of developments occurring from the beginning of 1997 through August 1998.[90]

106. Pakistan appears to assume that because the United States presented its data in an eight-month format, the United States somehow limited its inquiry to eight months. That assumption is wrong. As discussed above, the United States based its analysis on a two-year and eight-month period. This investigation established – as clearly set out in the Market Statement – that during the early part of the period under investigation, many industry indicators were relatively flat, but others revealed a worrisome trend.[91] Thus, going into 1998, the industry was already showing signs of distress. Conditions during 1998 – at which time global imports surged 91 percent and imports from Pakistan surged 283.2 percent – validated early indications of industry distress and, as discussed above, revealed an industry in imminent peril.

107. Pakistan never explains why this two year and eight month investigation was insufficient or, more importantly, how it violated the ATC. Rather, Pakistan appears to suggest that the United States should have indefinitely postponed taking safeguard action notwithstanding the clear demonstration of serious damage of the Market Statement and the requirements of ATC. As Raffaelli and Jenkins state, "[w]hile it is wrong to invoke serious damage when it does not occur, it is also wrong to systematically deny the occurrence of serious damage, even when it has occurred."[92] That is exactly what Pakistan is attempting to do, and the Panel should reject Pakistan's efforts to deny the clear showing of serious damage.

C. ***The United States Determined that Category 301 Imports Constituted an Actual Threat of Serious Damage to the Domestic Yarn for Sale Industry in Accordance with Article 6 of the ATC.***

108. The United States also presented a strong and compelling case in the Market Statement that imports of combed cotton yarn from Pakistan were causing an actual threat of serious damage to the defined U.S. industry.

1. *The United States Conducted a Separate and Prospective Analysis of Actual Threat of Serious Damage.*

109. As discussed above, Article 6.2 of the ATC allows a Member to take a safeguard action in cases where a surge in total imports causes serious damage or actually threatens to cause

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[90] The United States discussed this issue thoroughly in its 27 May 1999 submission to the TMB. Pakistan included this document as Exhibit PAK-5.

[91] Between 1996-1997 imports increased 12.1 percent, while inventories increased by 44 percent and unfilled orders dropped 23 percent. Market Statement, at Table I.

[92] Raffaelli and Jenkins, *supra* note 33, at 108.

serious damage to the domestic industry producing like and/or directly competitive products. Specifically, Article 6.2 states that:

> Safeguard action may be taken under this Article, when, on the basis of a determination by a Member, it is demonstrated that a particular product is being imported into its territory in such increased quantities as to cause serious damage or *actual threat thereof*, to the domestic industry producing like and/or directly competitive products. Serious damage or *actual threat thereof* must demonstrably be caused by such increased quantities in total imports of that product and not by such other factors as technological changes or changes in consumer preferences. (emphasis supplied).

110. However, Article 6.2 is unclear regarding whether a Member wishing to impose a safeguard must conduct a separate or prospective analysis of "actual threat thereof". The text of Article 6 – particularly Article 6.2 and Article 6.3 – provides no separate definition or factors to distinguish "serious damage" from "actual threat of serious damage." In addition, the overall purpose and context of Article 6 – which is to allow importing Members to impose a transitional safeguard to counter a surge in imports – is no different if the safeguard action is taken in response to currently existing damage or damage that will most likely occur in the near future.

111. Panels interpreting these provisions have not provided clear guidance. On the one hand, the Panel in *United States - Underwear* expressed that a Member may need to justify a finding of actual threat of serious damage with some form of prospective analysis: "...in our view, a finding on 'serious damage' requires the party that takes action to demonstrate that damage has already occurred, whereas a finding of 'actual threat of serious damage' requires the same party to demonstrate that, unless action is taken, damage will most likely occur in the near future."[93] However, the *Underwear* Panel expressed this "view" in the context of concluding that the Market Statement at issue in the case made findings exclusively on serious damage and made no reference to actual threat.

112. On the other hand, the Panel in *United States - Wool Shirts* declined to consider "whether serious damage or actual threat thereof is a single concept; whether serious damage is a short hand for the expression 'serious damage or actual threat thereof'; whether actual threat of serious damage is but a lower level of serious damage; whether the two expressions refer to different types of market situation in the importing market..."[94]

113. Nevertheless, the United States was clearly mindful of past admonitions by the panel decisions in both *United States - Underwear* and *United States - Wool Shirts* that the United

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[93] *United States - Underwear*, at ¶ 7.55.

[94] *United States - Wool Shirts*, at ¶ 7.53

States failed to refer to or conduct an analysis – prospective or otherwise – of actual threat.[95] As a result, in the Market Statement at issue in this matter, the United States conducted a separate and thorough analysis of "actual threat of serious damage" and reached a determination that "the subject yarn is being imported into the territory of the United States in such increased quantities as to cause actual threat of serious damage or the exacerbation of serious damage to the defined domestic industry."[96]

114. As discussed above, Article 6.3 sets forth the factors for determining serious damage or actual threat thereof resulting from increased quantities in total imports. Article 6.3 provides that:

> in making a determination of serious damage, or actual threat thereof, as referred to in paragraph 2, the Member shall examine the effect of those imports on the state of the particular industry, as reflected in changes in such relevant economic variables as output, productivity, utilization of capacity, inventories, market share, exports, wages, employment, domestic prices, profits and investment; none of which, either alone or combined with other factors, can necessarily give decisive guidance.

115. Based on a careful and prospective examination of this data, the United States reasonably concluded that the surge in imports had caused an actual threat of serious damage to the domestic industry. The analysis of the market starkly revealed that every major benchmark of economic performance during 1998 was deteriorating. The data conclusively demonstrated that *at the time that* imports from Pakistan were surging:

- *output* was dropping,
- *productivity* was deteriorating,
- *capacity utilization* was falling,
- *domestic market share* was declining,
- *employment* was decreasing,
- *prices* were falling,
- *profits* were diminishing,

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[95] *United States - Underwear*, at ¶ 7.55 *and United States - Wool Shirts*, at ¶ 7.53.

[96] Market Statement, at pp. 11-13.

- *investment* was stagnating,
- *inventories* were increasing and *unfilled orders* were falling, and
- *mills* were exiting the industry.[97]

116. The United States buttressed this showing with evidence that world prices – particularly those from Pakistan – were substantially below domestic prices. For all of Category 301, the world price was 7.8 percent below the average U.S. producers' price; the price from Pakistan was 26.2 percent below the average U.S. producer price.[98] For specific breakdowns of Category 301 yarn (the HTS numbers where imports were concentrated), the world price was 18 percent below the average U.S. producer price, and the Pakistan price was 28.3 percent below the average U.S. producer price.[99] Because price is a major factor in generating orders, the United States determined that it was "reasonable to conclude that domestic production, market share, and return on investment will continue to fall."[100]

117. These data overwhelming lead to the conclusion that the U.S. industry was in serious peril. Accordingly, the determination that "the defined domestic industry is threatened with serious damage or the exacerbation of serious damage from increased imports of the subject product"[101] was well grounded in the evidence documented in the Market Statement. As discussed *infra* part IV.D., the data clearly supported the U.S. attribution of the actual threat of serious damage to Pakistan, particularly given its 283.2 percent increase in imports in year-ending October 1998 and that the price of Pakistan's imports was well below both U.S. and world prices.

2. *Pakistan Fails to Establish a Prima Facie Case that the United States Did Not Demonstrate Actual Threat Consistent with the Terms of the ATC.*

118. Pakistan advances a number of criticisms of the U.S. analysis of actual threat of serious damage, namely, that the United States relied on faulty data and failed to engage in a prospective analysis. However, these assertions fail to establish a *prima facie* case that the United States violated the provisions of Article 6 in making its determination of actual threat of serious damage.

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[97] Market Statement, at ¶ 8.3.

[98] Market Statement, at ¶ 8.6 and Table II.

[99] Market Statement, at ¶ 8.6 and Table II.

[100] Market Statement, at ¶ 8.6

[101] Market Statement, at ¶ 8.7.

119. First, Pakistan claims that the Market Statement relies on the "same unverified, incorrect and incomplete data used for the determination of serious threat."[102] As discussed *infra* part IV.E, the United States relied on the best available data in reaching its determination of actual threat of serious damage to the domestic industry. Pakistan never states that the United States should have relied on data other than this for its determination of actual threat.

120. Second, without providing any reasoning or analysis, Pakistan asserts that "actual threat of serious damage can only be determine [sic] by...a '*prospective analysis*'"[103] and then claims that the United States failed to undertake a prospective analysis of the effect of imports in its determination of actual threat. As discussed above, the United States clearly set forth such an analysis in the Market Statement. Pakistan asserts that the U.S. analysis amounts to a "mere assertion that import and price trends will continue [and] does not meet the requirement of a prospective analysis."[104] However, Pakistan does not explain why the U.S. determination of actual threat of serious damage in any way violates Article 6 (or any other provision) of the ATC. Accordingly, it is difficult to discern on what basis the United States may have failed to comply with its WTO obligations.

121. Third, Pakistan introduces data to suggest that the Market Statement did not rely on the most up-to-date information and therefore cannot support the U.S. determination of actual threat of serious damage.[105] While Pakistan correctly states that Article 6.7 of the ATC requires that the Member requesting consultations regarding a transitional safeguard provide "specific and relevant factual information, as up-to-date as possible," Pakistan incorrectly states that the United States failed to comply with this requirement in its analysis of actual threat of serious damage. Table V of the Market Statement, to which Pakistan refers, includes import data up to and including October 1998. Because this data is generated on a monthly basis, it was available to the United States at the time of its investigation, and the United States accounted for this data in making its assessment.

122. However, import data is one of many economic variables required for the analysis of actual threat of serious damage. Article 6.3 provides 11 other economic variables that an importing party must examine. Pakistan fails to mention that, at the time the United States conducted this investigation, this data for the 11 other variables was only available through August. As discussed above, the four-month lag between August and December is the minimum lag that can be reasonably expected, given that the data for these other variables are not collected on a monthly basis.

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[102] First Written Submission of Pakistan, at p. 40.

[103] First Written Submission of Pakistan at p. 39.

[104] First Written Submission of Pakistan, at p. 40.

[105] First Written Submission of Pakistan, at p. 40.

123. Therefore, contrary to Pakistan's suggestion, the United States ensured that it used the most up-to-date information in making its assessment of actual threat of serious damage. Accordingly, in the Market Statement, the United States presented the latest available data, which for imports was current through October 1998, and for the other variables, was current through August 1998.

124. Fourth, Pakistan introduces new evidence of Pakistan's import trends *subsequent* to the investigation that is outside the scope of this proceeding.[106] The Panel in this case is called upon to review whether the United States imposed in accordance with Article 6 of the ATC a transitional safeguard based on the best available data as contained in the Market Statement *at the time that* the United States conducted its determination. As the Panel in *United States - Wool Shirts* stated, "...DSU panels...limit themselves to the evidence used by the importing Member in making its determination to impose the measure. In addition, such DSU panels ... do not consider developments subsequent to the initial determination."[107] Accordingly, the United States believes that this introduction of new evidence is outside the scope of the Panel's review and should be rejected.[108]

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[106] First Written Submission of Pakistan, at p. 41.

[107] *United States - Wool Shirts*, ¶ 7.21.

[108] Although outside the scope of the Panel's review, the United States notes, with regard to the new information Pakistan has presented, that a two month decline in year-ending imports of Category 301 yarn from Pakistan is not a meaningful trend. Imports of Category 301 yarn from Pakistan have a history of high month-to-month volatility, and Pakistan possesses the capacity to surge dramatically in a short period of time. Since 1996, monthly imports from Pakistan have ranged from zero to over one million kilograms. As it turned out, imports from Pakistan on a year-ending basis declined through August 1999, but Category 301 imports from Pakistan then surged again to the highest levels ever recorded, and Pakistan ended up actually overshipping the first year limit.

D. ***The Attribution of Serious Damage and Actual Threat of Serious Damage to Pakistan Fully Accords with Article 6.4 of the ATC.***

125. Pakistan fails to establish a *prima facie* case that the United States violated Article 6.4 in attributing the serious damage and actual threat of serious damage to a 283.2 percent surge in Category 301 imports from Pakistan. Based on an objective assessment of the facts, the Panel should conclude that the United States permissibly attributed serious damage or actual threat of serious damage to a sharp and substantial increase in imports from Pakistan.

1. *The United States Correctly Attributed Serious Damage and Actual Threat of Serious Damage to the Surge in Category 301 on the Basis of a Comparison of Imports from Other Sources, Market Share and Prices.*

126. The United States carefully examined all of the factors set out in Article 6.4 in making its attribution of serious damage and actual threat of serious damage to Pakistan. Pakistan misreads Article 6.4 when it isolates "comparative assessment" as the only factor relevant to the analysis of attribution of serious damage or actual threat of serious damage.[109] While a consideration of imports from other sources is an important step in the Article 6.4 attribution analysis, it is by no means the only factor to account for in attributing serious damage or actual threat of serious damage. As the text of Article 6.4 makes clear, the determination of attribution must be made on the basis of (a) a sharp and substantial increase in imports from a Member and (b) a comparison with imports from other sources, market share, and price.

127. The text of Article 6.4 of the ATC states, in part, that:

> Any measure invoked pursuant to the provisions of this Article *shall be applied on a Member-by-Member basis*. The Member or Members to whom serious damage, or actual threat thereof, referred to in paragraphs 2 and 3 is attributed, shall be determined on the basis of a sharp and substantial increase in imports, actual or imminent [footnote omitted], from such a Member or Members individually, and on the basis of the level of imports as compared with imports from other sources, market share, and import and domestic prices at a comparable stage of commercial transaction; *none of these factors, either alone or combined with other factors, can necessarily give decisive guidance.* (emphasis supplied)

128. Like the whole of Article 6, Article 6.4 is unique – specifically authorizing Members to impose a transitional safeguard on a *Member-by-Member* basis rather than on the basis of an entire product. The factors set out in Article 6.4 – and the recognition that "none of these factors, either alone or combined with other factors, can necessarily give decisive guidance" – reflect the carefully negotiated balance between importing and exporting Members.

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[109] First Written Submission of Pakistan, at p. 41.

129. Therefore, as a panel weighs the "carefully drawn balance of rights and obligations" for purposes of Article 6.4, it must look to the totality of factors set out in Article 6.4 and determine whether, based on the totality of these factors, the importing Member (the United States) attributed to the exporting Member (Pakistan) serious damage or actual threat of serious damage consistent with its ATC obligations. Exclusive focus on any one of these factors – as Pakistan suggests – would be inappropriate.

130. The Market Statement establishes a sharp and substantial surge of imports from Pakistan. Imports between January-August 1997 and January-August 1998 increased by *283.2 percent* (from 942,756 kilograms to 3,612, 652 kilograms). Measured using year-ending data, imports from Pakistan surged by *164.3 percent* between year-ending October 1997 and year-ending October 1998 (from 1,857,294 kilograms to 4,908,794 kilograms).[110]

131. The United States also compared this surge in imports from Pakistan to imports from other sources, market share, and price.[111]

- *Imports from Pakistan versus all imports*: The Market Statement establishes that while imports from all sources increased by over 90 percent, imports from Pakistan (the second largest supplier to the United States) increased by 283 percent between January-August 1997 and January-August 1998. During the same period, imports from Pakistan as a percentage of total imports doubled - surging from 8.8 percent to 17.5 percent.

- *Market Share of Pakistan versus market share of all imports*: The data set out in the Market Statement revealed that Pakistan's share of the market – as measured by production and total imports – increased dramatically. Imports from Pakistan as a percentage of production increased four-fold while total imports as a percentage of production doubled.[112]

- *Price from Pakistan versus price from other sources*: The Market Statement also compared prices of imports from Pakistan with prices from other sources. In comparison to prices in the United States and the rest of the world, the United States found that the prices of imports from Pakistan were substantially lower during the period of January-August 1998. Generally, U.S. imports of Category 301 from Pakistan entered the United States at an average landed duty-paid value of $3.63 per kilogram – 26.2 percent below the average U.S. price and 20 percent below the average world price.[113] For a specific subset of Category 301 (which represent the particular HTS headings where imports from

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[110] Market Statement at ¶¶ 7.2, 8.9, Table III.

[111] Market Statement at pp. 10, 11, 13, Table II, Table III, Table IV, and Table V.

[112] Market Statement at ¶¶ 7.4, 8.9, Table IV.

[113] Market Statement at ¶¶7.5, 7.6, 8.9, Table 2.

Pakistan were concentrated), imports from Pakistan entered the United States at an average landed duty-paid value of $3.39 per kilogram – 28.3 percent below the average U.S. price and 12.6 percent below the average world price.

132. Pakistan does not contest these figures.

133. Thus, based on the totality of factors, the United States reasonably concluded that serious damage and actual threat of serious damage to the industry is attributable to Pakistan. Pakistan's imports were surging by 283.2 percent compared to 73 percent from other sources; Pakistan's share of domestic production quadrupled from one percent to 4.1 percent; and Pakistan's average import price was 26.2 percent below the average U.S. price while the average world price was 7.8 percent below the average U.S. price.

2. *Pakistan Failed to Establish that the United States Violated Article 6.4.*

134. Pakistan wrongly asserts that the United States did not undertake the appropriate analysis under Article 6.4 of the sharp and substantial surge in imports from Pakistan based on a comparison with imports from other sources, market share from other sources, and price from other sources. As discussed above, the United States did so and reasonably concluded that serious damage and actual threat thereof was attributable to Pakistan.

135. Pakistan attempts to obfuscate this fact by claiming that Article 6.4 required the United States to conduct a specific comparative study of another importer. Specifically, Pakistan claims that Article 6.4 required the United States to undertake a specific comparative analysis between Pakistan and Mexico.[114] In Pakistan's words, "[a]bsent altogether from the Market Statement is a comparison of the respective prices and market shares of the imports from Pakistan and Mexico...The Market Statement does not indicate that the United States considered the sharp and substantial increase in imports from Mexico individually."[115] To support its claim, Pakistan presents data to make its point that exports from Mexico were also increasing at the same time that imports from Pakistan were surging.

136. Nevertheless, a rise in imports from another exporter does not represent a dispositive factor for purposes of Article 6.4. Under the ATC, a contemporaneous rise in imports from another Member does not – and should not – detract from the serious damage caused by the imports of the Member at whom the transitional safeguard action is directed.

137. As discussed above, Article 6.4 authorizes the importing Member to invoke a transitional safeguard on an individual Member on the basis of a surge in imports from that Member as compared with imports from other sources, market share and prices. Article 6.4 specifically states

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[114] First Written Submission of Pakistan, at p. 41.

[115] First Written Submission of Pakistan, at p. 41-42.

that "*none of these factors, either alone or combined with other factors can necessarily give decisive guidance.*" (emphasis supplied)

138. Rather, the increase in imports from other sources represents *a* factor in the Article 6.4 Member-by-Member attribution analysis. And it is a factor that the United States carefully considered in its determination of attribution. As set out in the Market Statement, the United States considered that imports from sources other than Pakistan were also rising.[116] The data indicated that, like imports from Pakistan, imports from countries with which the United States has Free Trade Agreements (Mexico, Canada, and Israel) were increasing.

139. However, the attribution analysis of the ATC does not end here and must include the other factors set out in Article 6.4. As discussed above, the United States thoroughly conducted this analysis of all such factors, including a comparison of imports from Pakistan with imports from the rest of the world, a comparison of Pakistan's share of domestic production with the share of domestic production represented by imports from all sources, and a comparison of prices from Pakistan with the rest of the world. Even though imports from its FTA partners were also increasing, Pakistan's prices (26 percent below U.S. producers' price) combined with the magnitude of the 283.2 percent surge in its Category 301 imports and its fourfold increase in its share of domestic production was simply glaring. Based on the totality of these factors, the United States reasonably concluded that – even though imports from its FTA partners were also increasing – serious damage or actual threat of serious damage was attributable to the 283.2 percent surge in imports from Pakistan.

140. Pakistan's suggestion that the United States was required to conduct a specific Member-by-Member assessment of each exporter whose imports into the United States has no support in the ATC. The ATC specifically allows an importing Member to impose a transitional safeguard on a Member-by-Member basis. The ATC only requires that the importing Party demonstrate attribution based on the totality of facts and circumstances of the case. The ATC does not require that an importing Member conduct a separate and distinct safeguard analysis of each importing Member but rather requires a comparison of imports from "other sources" – an analysis that the United States conducted.

141. The facts and circumstances of this case – notably the 283.2 percent surge in imports from Pakistan (compared to over 90 percent from all sources) at prices which were 26.2 percent below the average U.S. price – clearly demonstrate that the United States properly attributed to Pakistan the serious damage or actual threat of serious damage caused by increased quantities of imports of combed cotton yarn from Pakistan. To decide otherwise, based on Pakistan's groundless assertion that Article 6.4 requires a comparative assessment of each Member, would unacceptably increase the burden on importing parties and in turn would upset Article 6's "carefully drawn balance of rights and obligations of Members." Article 6 neither imposes nor

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[116] Market Statement, at Table V.

contemplates requirements that would undermine safeguard action when the facts and circumstances support such action.

E. ***The Transitional Safeguard on Category 301 Imports Relies on the Best Available Data Consistent with Article 6.7 of the ATC.***

142. The United States employed an appropriate and reasonable methodology for collecting and analyzing the data used to support its determination that the 283.2 percent surge in imports from Pakistan had caused serious damage and actual threat of serious damage to the U.S. combed cotton yarn for sale industry.

143. As discussed in the Market Statement, the United States conducted its investigation using the best information available and relied on official data to the extent possible. Where official data were not available, the United States used information from other sources and verified this information. The United States relied on official U.S. Bureau of Census statistics to obtain import and export data for the defined industry and to verify the production data supplied by AYSA. Because official data were not available for shipments, employment, wages, man-hours, capacity utilization, inventories, unfilled orders, productivity, profitability, and investment, the United States utilized AYSA data for these factors and verified them to the extent possible. The United States also relied on published data to the extent that it was available.[117]

1. *The ATC Affords the Importing Party Discretion in Establishing a Methodology for the Collection and Analysis of Data.*

144. The ATC sets forth no methodology for the collection and analysis of data. The panel in *United States - Wool Shirts* reaffirmed this conclusion by clearly stating that "...we reiterate that we do not interpret the ATC so as to impose on WTO Members any method of collecting data but that it is up to each concerned Member to collect the relevant data from relevant sources, *possibly including the private sector*."[118] (emphasis supplied)

145. Article 6.7 of the ATC merely requires that the Member accompany its request for consultations with specific, relevant, and current factual information. Article 6.7 provides, in part, that:

> The Member proposing to take safeguard action shall seek consultations with the Member or Members which would be affected by such action. The request for consultations shall be accompanied by specific and relevant factual information, as up-to-date as possible, particularly in regard to: (a) the factors, referred to in paragraph 3, on which the Member invoking the action has based its

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[117] Market Statement, at ¶ 1.4.

[118] *United States - Wool Shirts*, at ¶ 6.4.

> determination of the existence of serious damage or actual threat thereof; and (b) the factors, referred to in paragraph 4, on the basis of which it proposes to invoke the safeguard action with respect to the Member or Members concerned. In respect of requests made under this paragraph, the information shall be related, as closely as possible, to identifiable segments of production and to the reference period set out in paragraph 8...

Moreover, Article 6.8 establishes this reference period as the "...12-month period terminating two months preceding the month in which the request for consultations was made."

146. The United States complied with the terms of Article 6.7 with respect to providing Pakistan the Market Statement, which contained specific, relevant, and current information with respect to the economic variables contained in Article 6.3 and the factors relating to attribution set forth in Article 6.4. The information presented and analyzed by the United States in the Market Statement was "as up-to-date as possible" – reflecting data from 1996, 1997, and the first eight months of 1998 and including the most current import data through October 1998.[119]

147. The information presented to Pakistan was also "related, as closely as possible, to identifiable segments of production and to the reference period set out in paragraph 8." As reflected in the Market Statement, the United States reviewed data reflecting a period of two years and eight months and evaluated the level of imports and the effect of the increase in imports of combed cotton yarn on the defined domestic industry, as reflected in such economic variables as output, productivity, capacity utilization, inventories, market share, exports, wages, employment, domestic prices, profits and investment.

148. Pakistan, however, contends that the data contained in the Market Statement is in some way "unverified, incorrect and incomplete." Specifically, Pakistan claims that the United States failed to verify the data supplied by the private sector and incorrectly determined the number of plant closures and employment figures.

2. *The United States Verified All Data It Received From the Private Sector to the Extent Possible and in a Reasonable Manner.*

149. As discussed above, the United States received data from industry regarding a number of factors, including production, shipments, employment, wages, man-hours, capacity utilization, inventories, unfilled orders, productivity, profitability, and investment. Pakistan mistakenly claims that the United States failed to verify such data and relied on flawed statistics. As discussed below, this contention does not withstand scrutiny.

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[119] As discussed *supra* part IV.B.3.b, it would be unreasonable to expect that an investigation supporting a request for consultation made in December 1998 could have collected more up-to-date data. Given the availability of data, the Market Statement reflects the latest available data, which for imports, was current through October 1998, and for the other variables, was current through August 1998.

150. Pakistan first takes issue with the production statistics supplied by the AYSA and claims that this data was inherently untrustworthy. However, the United States carefully verified the AYSA's production statistics based on official U.S. Bureau of Census data.[120] Specifically, AYSA supplied production data for calendar years for 1996, 1997, January-August 1997 and January-August 1998. For calendar years 1996 and 1997, the United States verified that the 1996 and 1997 production data was consistent with official U.S. Bureau of Census data. The United States was unable to compare data for the first eight months of 1998 directly with official Census Bureau data, given that official statistics for 1998 were not available at the time the Market Statement was prepared.[121] Having already verified that the 1996 and 1997 production data provided by AYSA was consistent with official data for the same time periods, the United States was able to reasonably rely on the accuracy of the production data supplied by AYSA for January-August 1998.

151. However, Pakistan claims that the data supplied by AYSA for January-August 1998 was unsupported by 1998 data *subsequently* released by the Census Bureau. According to Pakistan, AYSA data reported a 10.2 percent (between January-August 1997 and January-August 1998) decline in production while Bureau of Census data reported a five percent drop (between calendar year 1997 and calendar year 1998).[122]

152. Before turning to this argument, the United States notes that introduction of this new evidence by Pakistan is improper given that it relates to data that was *not* available to the United States at the time it prepared the Market Statement. In this regard, the United States recalls that the panel in *United States - Wool Shirts* specifically stated that panels "...do not reinvestigate the market situation but rather *limit themselves to the evidence used by the importing Member in making its determination* to impose the measure. In addition, such DSU panels...*do not consider developments subsequent to the initial determination.*"[123] (emphasis supplied) Accordingly, the Panel should decline to consider the new information presented by Pakistan.

153. Nevertheless, contrary to Pakistan's assertion, the 1998 Census data *supported* the AYSA data. Both AYSA and Census data showed a sharp decline in production in 1998. AYSA data showed a decline of 10.2 percent *between January-August 1997 and January-August 1998.* The Census data also showed a decline of 5 percent, *for calendar year 1997 and 1998.* Because the two data sets represent different time periods, an absolute comparison is impossible, and the fact that the level of decline was different for the two data sets does not indicate that either is

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[120] Market Statement, at ¶ 1.4.

[121] The U.S. Bureau of Census only collects and reports yarn production data on an annual basis.

[122] First Written Submission of Pakistan, at p. 31.

[123] *United States - Wool Shirts*, at ¶ 7.21.

incorrect. Rather, it confirms that the trend was down during the year and implies that the greatest downturn in production occurred in the first eight months of the year.[124]

154. Pakistan also suggests that the United States failed to verify AYSA data on profitability and investment – submitted to the United States in the form of two separate AYSA surveys. The United States verified the profit and investment information to the extent possible. All but one of the member firms of AYSA are private companies. Profit and investment data of private companies are not publically available and are not available through U.S. Government data sources. AYSA collected such data in its survey of companies on a confidential basis, aggregated this data, and reported the aggregate data to the United States. The United States contacted the companies surveyed by telephone and confirmed that they had participated in the survey and that the aggregate figure reported by the AYSA was consistent with their own situation and knowledge of industry conditions.[125]

155. Pakistan also submits new evidence to support its contention that the United States failed to justify its claim that investment in the industry has been used to update and replace equipment rather than create new productive capacity. Pakistan claims that data for 1993-1997 – which reveal a decrease in the number of units producing combed cotton yarn but an increase in the production of such yarn – demonstrate that "substantial restructuring in the industry was thus coupled with a substantial increase in investment."[126]

156. The United States notes that introduction of 1993 data is beyond the scope of this proceeding and that the Panel is limited to the evidence used by the importing Member in making its determination to impose the measure and is not to reinvestigate the market situation.[127] The United States acknowledged in the Market Statement that companies had invested in order to increase productivity, but noted that additional investment seemed unlikely.[128] In addition, contrary to Pakistan's suggestion, the mere fact of a decrease in the number of plants coupled with an increase in production does not prove substantial investment in increased capacity. For example, the equipment in the closed plants could have been relocated to the plants remaining in operation or plants could have run more shifts in 1997 and/or experienced less plant downtime.

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[124] Pakistan implies that the United States should have delayed its transitional safeguard action because the 1998 AYSA data could not be compared to 1998 Census data at the time the Market Statement was prepared. If a Member were required to wait until all data forming the basis of a Market Statement could be compared to official government statistics, it would be impossible for a Member to take a transitional safeguard action at any time of the year other than when the official data becomes available. The United States took its action based on verified production data and, as discussed *infra*, continued the verification process even after issuing the Market Statement.

[125] Market Statement, at ¶1.4, note 3.

[126] First Submission of Pakistan, at p. 35.

[127] *United States - Wool Shirts*, at ¶ 7.21.

[128] Market Statement, at ¶¶ 5.15-5.16.

157. Finally, Pakistan once again introduces additional evidence outside the scope of the Panel's review – the 1997 Market Statement on Combed Cotton Ring Spun Yarn – in another attempt to assail the integrity of the U.S. data and undermine the statistics contained in the Market Statement.[129] Given that the Panel is limited to the evidence *used by the importing Member in making its determination*,[130] the United States urges the Panel to refuse to consider this additional evidence.

158. However, should the Panel consider the 1997 Market Statement to be relevant, the United States believes that it only enhances – rather than undermines – the integrity of the data contained in the Market Statement. On 23 April 1997, the United States requested consultations and issued a market statement on combed cotton *ring spun* yarn (a subset of the Category 301 imports at issue in this case). In the process of conducting ongoing verification of the data, the United States discovered evidence that called the 1997 statement into question. As a result, consistent with the sound administration of the U.S. textile program, the United States did not impose an Article 6 safeguard with respect to combed cotton ring spun yarn and instead continued to monitor imports of combed cotton yarn from Pakistan.

159. Therefore, far from suggesting that the United States invoked the Article 6 transitional safeguard mechanism based on unverified and incorrect data, the circumstances surrounding the U.S. decision to invoke and later revoke its intention to take transitional safeguard action on combed cotton ring spun yarn demonstrates the extent to which the United States used the best information available, verified the information to the extent possible, and continued to monitor the industry to ensure that the information that ultimately formed the basis for the Market Statement was correct and accurate.

3. *The United States Properly Analyzed Data Regarding Plant Closures and Employment Trends.*

160. Pakistan makes a number of incorrect allegations regarding plant closures and employment trends and then asserts that industrial adjustment in some way minimizes the serious damage suffered by the domestic combed cotton yarn industry.

161. First, Pakistan challenges evidence that three of the 22 establishments producing combed cotton yarn for sale had closed during 1997 and 1998 and that there was a loss of 423 jobs in the defined industry between 1996 and August 1998 due to the adverse impact of Category 301 imports. Pakistan recognizes that one of these mills – China Grove Textiles, Arlington, N.C. Plant – closed but asserts that the other two establishments remain productive in another, different capacity. The United States does not contest this assertion but strongly disagrees with Pakistan that the three establishments were not directly impacted by the intense competition of

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[129] First Submission of Pakistan at p. 30, 35.

[130] *United States - Wool Shirts*, at ¶ 7.21.

low-price imports from Pakistan. These three establishments exited the defined industry, with the resultant loss of 423 production worker jobs in that industry.[131]

162. Although it is not the role of the Panel to reinvestigate the market situation,[132] the United States provides below the accurate information on the three establishments in question:

- China Grove Textiles, Arlington N.C. Plant: Pakistan avoids mentioning that this plant exited the industry and completely ceased production of combed cotton yarn for sale during the investigation period. The plant later converted to production of a different product, carded cotton yarn. This new operation was not profitable and the plant ceased all manufacturing operations in December 1998. The plant is now a warehouse.

- Harriett & Henderson, Henderson N.C. Plant: This plant ceased production of combed cotton yarn in 1997 and was retooled and renovated to produce *carded* cotton yarns.

- Dixie Yarn, Tarboro N.C. Plant This plant ceased production of combed cotton sales yarn in 1998. Subsequently, the Dixie Group sold the plant to Pillowtex Corporation – a vertically integrated manufacturer of home furnishings. The plant now produces *carded* cotton yarn in the process of manufacturing *towels*. Thus, this plant no longer produces combed cotton yarn for sale, but rather carded cotton yarn for use in the integrated manufacture of towels.

163. All three plants exited the defined industry – one closed permanently, and the other two produce entirely different products. That these two plants continue to operate *in another capacity and in other markets* is not relevant to determining serious damage to the defined industry. Rather, what is relevant is the fact that the deteriorating industry conditions (i.e., dropping production, declining profitability, increasing inventories, etc.) faced by the combed cotton yarn industry at the time of the surge of imports from Pakistan directly caused these three mills to exit the combed cotton yarn industry. Because of the situation they faced, they were no longer viable industry participants and were forced to either shut down entirely or produce different products.

164. Pakistan goes to great lengths to assert that "retooling" should somehow mitigate the serious damage done to the industry by the surge in imports. Pakistan explains that the production of *carded* cotton yarn is similar to the production of *combed* cotton yarn.[133] Pakistan

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[131] The United States made these same arguments in its 27 May 1999 submission to the TMB, which Pakistan has included as exhibit PAK-5.

[132] *United States - Wool Shirts*, at ¶ 7.21.

[133] Pakistan overstates the ease with which a plant can convert production from combed cotton yarn to carded cotton yarn. Pakistan fails to take into account the amortization cost of idling equipment, lost plant and equipment facility, and marketing cost required to establish a new customer base. Because of the financial risk

(continued...)

then asserts that this retooling is consistent with the "continuous autonomous industrial adjustment" provided for in Article 1.5 of the ATC and therefore that Article 6.2 of the ATC cannot be interpreted to permit safeguard actions designed to prevent industrial adjustment.[134]

165. In essence, Pakistan is claiming that restructuring or retooling by its nature is inconsistent with the existence of serious damage. In this view, an Article 6 transitional safeguard is inappropriate if an industry is able to successfully restructure in response to an import surge or if an employee in a failing mill is able to find a job in another industry.

166. The United States strongly rejects this contention. Restructuring – or "continuous autonomous industrial adjustment" – does not require a situation of serious damage. Rather, it is part of the normal evolution of the industry. In certain instances, plants may have internal incentives to restructure: restructuring may further innovation; it may enhance productivity; or it may lead to increased profitability. In other cases, an industry may be forced to retool because of serious damage caused by a surge in imports. The ATC allows the textiles and clothing sector to restructure over a ten-year period. The ten-year quota phase-out allows U.S. textile mills time to implement the necessary investment and business decisions to compete in a quota-free environment. The Article 6 safeguard mechanism is an essential of element of both the transitional period and the restructuring process; it allows industries seriously damaged by or actually threatened by increased quantities of imports during the transition period the time needed to adjust.

167. The case before the Panel is one of forced restructuring which occurred as the direct result of serious damage to the industry caused by a surge in imports. The fact that some mills went on to restructure and retool in no way detracts from the serious damage facing the combed cotton yarn industry when the United States issued its Market Statement in December 1998. These mills and their employees – although lucky to find a new home in another industry – had no choice but to abandon the combed cotton yarn industry.

168. Contrary to Pakistan's suggestion, the United States did not base its determination of serious damage and actual threat thereof *solely* on the fact that three mills and their employees exited the combed cotton yarn industry. While important, the data on employees and firms exiting the defined industry constitute one of the many factors that the United States examined. As discussed above, the United States based its determination on a wide-range of additional factors, including production, shipments, exports, capacity utilization, inventories, unfilled orders, wages, productivity, profits, investment, market share, import share, prices, and the apparent domestic market.

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[133] (...continued)
involved, such conversions are generally not feasible without a substantial re-engineering of the facility.

[134] First Written Submission of Pakistan, at 34.

169. These factors, taken alone or together, revealed a domestic industry in imminent peril – with declining production and shipments, deteriorating financial performance, rising inventories and falling unfilled orders, dwindling market share, contracting exports, and stagnating investment. Based on careful consideration of *all* these factors – not just the number of employees and firms exiting the industry – the United States concluded that the 283.2 percent surge in imports from Pakistan had caused serious damage and actual threat of serious damage to the domestic combed cotton yarn for sale industry.

F. ***The Transitional Safeguard On Category 301 Imports Is Consistent With Article 2 Of The ATC.***

170. As discussed above, the United States imposed the transitional safeguard on Category 301 imports of combed cotton yarn from Pakistan in accordance with Article 6 of the ATC. Accordingly, the United States complied with its obligations under the ATC, including under Article 2.

V. CONCLUSION

171. For the foregoing reasons, the United States respectfully submits that its transitional safeguard measure applied to imports from Pakistan of combed cotton yarn satisfies U.S. obligations under the ATC. Pakistan's claims to the contrary are without merit and the Panel should reject them.

LIST OF EXHIBITS

Exhibit Number	Exhibit
U.S.-1	U.S. Textile and Apparel Category System: Correlation of Harmonized Tariff Schedule (HTS) Numbers with Specific Textile Categories
U.S.-2	Public Notice of Request for Public Comments on Bilateral Textile Consultations with the Government of Pakistan, December 31, 1998
U.S.-3	Report of Investigation and Statement of Serious Damage or Actual Threat Thereof: Combed Cotton Yarn for Sale, Category 301 ("Market Statement"), December 1998
U.S.-4	Public Notice of Establishment of an Import Limit for Certain Cotton Textile Products Produced or Manufactured in Pakistan, March 12, 1999
U.S.-5	Agreement on Textiles and Clothing: Communication from the United States of August 6, 1999
U.S.-6	Public Notice of Establishment of an Import Limit for Certain Cotton Textile Products Produced or Manufactured in Pakistan, March 14, 2000
U.S.-7	Report of the Forty-Third Meeting of the Textiles Monitoring Body ("TMB")
U.S.-8	U.S. Census Bureau Survey on Yarn Production
U.S.-9	Excerpts from 1997 *Current Industrial Report* - Yarn Production